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IN THE

Supreme Court of the United States

October Term, 1949

No. 205

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et al.

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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INDEX

	PAGE
Opinion below	1
Jurisdiction	2
Question presented	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	12
Motion to dispense with printing of record	13
Appendix A	15
Opinion of Supreme Court of Indiana	15
Opinion on petition for rehearing	22

CITATIONS

Cases:

American Federation of Labor v. *Swing*, 312 U. S. 321	12
Civil Rights Cases, 109 U. S. 3	11
Daniel v. *Farm Security Life Ins. Co.*, 336 U. S. 220	9
Dent v. *West Virginia*, 129 U. S. 114, 121	7
Hale v. *Kentucky*, 303 U. S. 613	12
Hawker v. *New York*, 170 U. S. 189	8
The Ipswich Taylors' Case, 11 Coke 53a, 77 Eng. Rep. 1218 (K. B. 1614)	7
Liggett Co. v. *Baldridge*, 278 U. S. 105	9

PAGE

Lincoln Federal Labor Union v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 9

McNaughton v. *Johnson*, 242 U. S. 344 8

Norris v. *Alabama*, 294 U. S. 587 12

Pierre v. *Louisiana*, 306 U. S. 354 12

Reetz v. *Michigan*, 188 U. S. 505 8

Shelley v. *Kraemer*, 334 U. S. 1, 13-14 12

Yick Wo v. *Hopkins*, 118 U. S. 356 8

Statutes:

Burns Indiana Statutes 11

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Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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Your petitioner, D. Lee Andrews, respectfully prays that a writ of certiorari be issued to review a determination by the Supreme Court of the State of Indiana entered in the cause on April 25, 1949. A transcript of the record of the cause, including the proceedings in the Supreme Court of Indiana, is furnished herewith in accordance with Rule 38 of the rules of this Court.

OPINION BELOW

The opinion of the Supreme Court of Indiana (Tr. 294-304) is reported in 84 N. E. 2d 469. The further opinion of the Court denying your petitioner's petition for rehearing (Tr. 308-309) is reported in 85 N. E. 2d 365.

JURISDICTION

The opinion of the Supreme Court of Indiana was delivered March 14, 1949 (Tr. 294), its further opinion denying petitioner's petition for rehearing was delivered April 25, 1949 (Tr. 308), and its judgment was subsequently entered. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

QUESTION PRESENTED

Whether the discriminatory and arbitrary refusal by the trustees of a public, state-supported hospital to permit a medical practitioner, fully qualified legally, to use the facilities of the hospital invades rights secured to the petitioner under the federal constitution.

STATEMENT

Petitioner filed his amended complaint (Tr. 11-19) in the Circuit Court of Hamilton County, Indiana, against Hamilton County Hospital, its four trustees, and its superintendent, praying that respondents be enjoined from further denying petitioner, a licensed medical practitioner, and his patients, admission to the public hospital in violation of the constitution and laws of the United States. At the trial of the cause, the following facts were established:

Petitioner, a man 47 years of age at the time of trial (Tr. 83), attended Indiana School of Medicine for four years from 1934 until he received his degree as a Doctor of Medicine in 1938 (Tr. 85; Pet. Ex. 6, Tr. 47-48). He practiced his profession of medicine in Clermont and Indianapolis, Indiana, from 1938 to 1942 (Tr. 40, 85-86) at which latter date he entered the armed forces (Tr. 40). Petitioner was discharged from the Army after two years of service, including a year at the Army's 1750 bed hos-

pital at Fort Knox, Kentucky (Tr. 88), his certificate of service showing that his Army specialty was plastic surgery (Tr. 45). Petitioner then located and practiced his profession in Louisville, Kentucky, for two years commencing January 1945 (Tr. 88-89).

Petitioner holds an unlimited license to practice medicine in Indiana (Pet. Ex. 2, Tr. 43), and he also holds an unlimited license to practice "medicine, surgery and obstetrics" issued by Hamilton County, Indiana (Pet. Ex. 1, Tr. 41-42). He is a member of the Indiana Medical Association and a Fellow in the American Medical Association (Tr. 40). In addition to his other medical qualifications he took, in November 1939, the regular one-month intensive clinical course in general surgery at Harvard University (Tr. 87), and, while in the Army in 1943, a three-months intensive course in maxillo-facial and plastic surgery at Columbia University's post-graduate school of medicine (Tr. 87-88). He has practiced medicine in at least eight hospitals (Tr. 61, 89-90), and, as part of his medical practice since 1938, has performed over three hundred major surgical operations and several hundred minor operations (Tr. 50-52). His educational qualifications to practice medicine have never been questioned by any hospital or any medical society, including the Hamilton County Medical Society (Tr. 98).

In December 1946, while still located at Louisville but while contemplating removal to Noblesville, Hamilton County, Indiana, petitioner visited the respondent hospital and was told by the respondent superintendent that his proposal to locate in Noblesville was "fine" since more doctors were needed (Tr. 52-53). Respondent Hamilton County Hospital is the only hospital in the County, public or private (Tr. 58). In order for petitioner properly to perform his duties, it is necessary that he be allowed to have his patients admitted to it (Tr. 82).

Petitioner moved to Noblesville on January 1, 1947 (Tr. 39). In February 1947 he was permitted to admit a patient to respondent Hospital on his representation that, though not a member of the Hamilton County Medical Society, he was a member of the Indianapolis Society and his application in the Hamilton Society was pending (Tr. 53). Subsequently, petitioner was refused permission to admit patients because of his lack of membership in the Hamilton Society (Tr. 53-56.* This refusal has caused petitioner grave damage and has prevented his taking a number of surgical and medical cases (Tr. 59-60). Neither the superintendent nor any of the four trustees knows of any reason why petitioner should not be permitted to practice medicine and surgery in respondent Hospital (Tr. 147-148; 131, 140; 132; 137; 144).

After arrival in Noblesville in January 1947, petitioner had formally requested that his membership in the Indianapolis Medical Society be transferred to the Hamilton County Medical Society and that he be admitted to that organization (Tr. 48-49). No action was ever taken on this application until September 20, 1947, when petitioner received a notice (Pet. Ex. 7, Tr. 50) that his application for membership in the Hamilton County Medical Society was rejected. No reason was ever given petitioner why he was refused admission to the Society and he knows of no reason whatever therefor (Tr. 98). Except for petitioner, no licensed physician, resident of Hamilton County, has ever been refused admittance to the Society (Tr. 275).

On September 6, 1947, petitioner's counsel formally notified respondents by letter (Pet. Ex. 10, Tr. 107-109) that petitioner would present a patient for admission to the hospital on September 11, and that, if admittance was

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* Petitioner's proffered testimony to relate several conversations had with some of the respondent trustees in his efforts to be permitted use of the hospital, was excluded by the trial court on respondents' objections (Tr. 56-57).

refused, application to the courts for relief would be commenced. On *September 9, 1947,* respondent trustees adopted the "Rules and Regulations for the Government of the Hamilton County Hospital" (Pet. Ex. 8, Tr. 63-80) which are at issue here.

Pertinent portions of those Rules and Regulations, which were relied upon by respondents in denying petitioner use of the Hospital, provide (in partial paraphrase and with emphasis supplied): The active medical staff of the Hospital shall consist of "the Resident Active Medical Staff, which shall include all the physicians having an unlimited license to practice medicine in the State of Indiana and *having membership in the Hamilton County professional organization of fully licensed physicians having the largest number of such physicians residing in Hamilton County.*" (Art. V, Sec. 1; Tr. 67-68). "All appointments to the staff and assignments to services shall be made by the Board of Trustees *but only upon the recommendation of the Active Medical Staff.*" (Art. V, Sec. 2; Tr. 69). "A surgeon desiring to practice surgery *who was not a member of the surgical staff of the hospital according to the records of the hospital on March 1, 1947,*" shall be a member of the staff, have a certificate establishing one year's internship in a hospital approved by the American Medical Association, and shall also have had three years of surgical training meeting the aproval of the American College of Surgeons (Art. VII, Sec. 1; Tr. 75).*

* In theory, petitioner was not flatly denied the right to admit patients to respondent Hospital. Petitioner, though not a staff member, might admit patients subject to all the following conditions: Petitioner must give the respondent's superintendent a written diagnosis of the patient's ailment and the services proposed to be rendered; the superintendent must call in a staff member to check the diagnosis and proposed treatment; the staff member must attend and supervise the rendition of the service or treatment; the patient must pay the staff member the same fee he would have received for rendering the services himself; and the non-staff physician must advise the patient of all requirements, including the patient's obligation for a fee to the staff member. (Art. VII, Sec. 1; Tr. 72-74).

On these facts the trial court found that the material allegations of petitioner's complaint were true, and awarded him the relief sought (Tr. 25-26). The Supreme Court of Indiana affirmed so much of the trial court's judgment as enjoined respondents from denying the petitioner the right to use respondent hospital to practice general medicine, excluding surgery, but reversed so much of the judgment as enjoined respondent from preventing petitioner from doing surgery in the Hospital.

The Supreme Court reached this conclusion on the theory that the rules and regulations were reasonable and lawful in requiring, as a prerequisite to performing surgery, one year's interneship and three years' residency in an approved hospital. It failed to advert to the facts that these requirements were applicable only to physicians *who were not members of the staff on March 1, 1947;* that of 25 physicians residing and practicing in Hamilton County, no more than two would have been qualified to perform any surgery at respondent Hospital but for their membership on the staff prior to March 1, 1947; and that the rules and regulations, adopted in the context of circumstances above described, were patently aimed and designed to deprive petitioner of the use of the respondent Hospital.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Indiana erred:

1. In holding that the issues before it did not transcend a determination as to the reasonableness of the rules and regulations adopted by the respondent trustees for governance of the hospital;

2. In failing to hold that the rules and regulations were arbitrarily and discriminatorily aimed at the exclusion of petitioner from the use of the public hospital;

3. In failing to hold that the restrictions placed on petitioner's use of the public hospital were arbitrary and discriminatory denials of rights assured to the petitioner by the federal constitution and by federal law;

4. In failing to hold that the action taken by respondent trustees deprived petitioner of liberty and property without due process of law and denied him the equal protection of the laws, all contrary to the Fourteenth Amendment to the Constitution of the United States;

5. In partially reversing the judgment entered by the trial court;

6. In denying petitioner the full relief sought.

REASONS FOR GRANTING THE WRIT

I

The present case presents a question of wide public importance. It involves the right of an individual to engage in his chosen profession or pursuit, unobstructed by discriminatory and arbitrary restrictions. In calling upon this Court to confirm his right to pursue his profession on equal terms with others, petitioner is invoking an ancient liberty guaranteed by the federal constitution. The importance of this principle, a heritage of early Anglo-American law (see, e. g., *The Ipswich Taylors' Case,* 11 Coke 53a, 77 Eng. Rep. 1218 (K. B. 1614)), was recognized by this Court early in the history of the Fourteenth Amendment (*Dent v. West Virginia,* 129 U. S. 114, 121):

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions."

It is true that the action of which petitioner here complains is not in form a complete barrier to his pursuit of his profession. But, in practical effect, it approaches its equivalent. The restriction imposed is one on petitioner's use of a public facility (the respondent Hospital) which is obviously essential in the pursuit of his profession. Petitioner, having fully qualified as a medical practitioner, is as much entitled to equality in use of the public hospital as, for example, in the use of the public roads of Indiana.

It is to be emphasized that there is here no issue as to, and we do not challenge, the well-established power of a state reasonably to regulate the qualifications of those desiring to engage in a profession. *Reetz v. Michigan*, 188 U. S. 505; *McNaughton v. Johnson*, 242 U. S. 344; cf. *Hawker v. New York*, 170 U. S. 189. Here petitioner has complied with all the requisites to the practice of his profession which the State of Indiana has seen fit to prescribe. He holds an unlimited license to practice medicine in all its branches in the state. The state prescribes no other qualifications.

It has always been true that the action of county officials, in arbitrarily barring some, but not others, from engaging in their chosen calling, violates rights secured to citizens of the United States by the Constitution. *Yick Wo. v. Hopkins*, 118 U. S. 356. The right of every citizen to follow his chosen calling must be preserved, provided always but provided only that the citizen meet all lawful requisites to engagement in his chosen calling prescribed by the state in the exercise of its police power. Indiana could not, by direct legislative command, deny to petitioner the right to engage in any calling for which he is lawfully qualified. What Indiana cannot do by direct legislative command, its petty county officials cannot effect by indirection.

This Court has not considered in recent years the general principle respecting the freedom of an individual to

engage, on an equal and non-discriminatory basis, in the lawful calling of his selection. *Daniel v. Farm Security Life Ins. Co.*, 336 U. S. 220, considered the dissimilar problem whether a state may prescribe a combination of occupations which the state viewed as an evil. *Liggett Co. v. Baldridge*, 278 U. S. 105, which in any event has only a remote relation to the present cause, is an unsatisfactory precedent because of the criticism directed at its language by this Court in the *Daniel* case. See, also, *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525.

Petitioner respectfully submits that it is time for this Court to reaffirm certain basic principles respecting the individual's liberty to pursue, unfettered by other than lawful state authority, the calling he selects. A case involving principles of this character is necessarily of wide application and great general importance.

II

That arbitrary discrimination was practiced and enforced against your petitioner is not open to doubt. His application for admission to the Hamilton County Medical Society, made in January 1947, as an incident to his effort to be permitted to use respondent Hospital, was responded to only by letter of September 20, 1947. The response then merely stated that petitioner's application was denied. No reason was then or has ever been given why he should not be admitted to the Society.

The action of rejection by the Medical Society was reached at its meeting held on September 9, 1947. On this same date, the respondent trustees of the respondent hospital passed the rules and regulations for governance of the hospital which, in conjunction with the Medical Society's action, had the effect of denying petitioner all use of the Hospital. The significance of the date on which both the Society and the Hosptial took their interlocking action is heightened by the fact that petitioner, through counsel, had served notice on September 6, 1947, that he intended

to force the issue of his right to use the Hospital by presenting a patient for admission to it on September 11, 1947.

To assume, as did the Indiana Supreme Court, that the question before it was merely one as to the reasonableness of the rules and regulations adopted by the respondent trustees, is completely to ignore this context of surrounding circumstances. Petitioner has always predicated his claim for relief against respondents on the ground that unlawful and arbitrary discrimination was practiced against him in violation of his constitutional rights (Amended Complaint, Tr. 12-19; see, particularly, sections III, IV, and VII). The federal question has, thus, always been before the courts of Indiana, and must have been determined adversely to petitioner by the Supreme Court of Indiana in denying him the relief sought.

While that court rejected the palpably illegal rules and regulations which conditioned the right to general use of the Hospital on admission to the County Medical Society, it affirmed those restrictions which deprived petitioner of his right to use the Hospital for the performance of surgery. We submit that the court erred, and denied petitioner fundamental rights, when it considered those restrictions with respect to the practice of surgery merely *in vacuo*. The restrictions applicable to the practice of surgery were part and parcel of a plan designed unreasonably and unlawfully to exclude petitioner from a public institution. They can only be considered and interpreted in the light of the accompanying circumstances which disclose their arbitrary and discriminatory purpose.*

The effect of the Indiana court's decision cannot be escaped on the ground that it constituted merely an incorrect decision as to petitioner's rights, but did not invade rights

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* The mystery as to why respondents determinedly endeavored to bar petitioner from the Hospital is not resolved by the record. As possibly throwing light on this endeavor, the Court's attention is invited to Petitioner's Exhibit 12 (Tr. 246-252), a letter written to petitioner by the attorney for his then wife who was also attorney for the Indiana State Medical Association.

assured to the petitioner by the federal Constitution. It is true that the Fourteenth Amendment does not prohibit discriminations which are merely the "wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial, or executive proceedings." *Civil Rights Cases,* 109 U. S. 3, 17. But here more is involved than wrongful private action.

Respondent Hospital is, for present purposes and in substance, a state institution, and the act of its trustees in arbitrarily excluding petiitoner from its use constitutes state, and not private, action. Respondent Hospital owes its existence to the statutory provisions of the State of Indiana which set forth the manner in which "any county in this state may establish a public hospital." 5 *Burns Indiana Statutes* § 22 - 3215. Among the conditions requisite to the establishment and maintenance of a county hospital is the imposition of an annual tax levy. *Idem.* Bonds may be issued for the support of the hospital (§ 22 - 3223), appropriations from county general funds may be made for its improvement and maintenance (§22 - 3228), and the power to condemn for hospital purposes is conferred (§ 22 - 3225). That Indiana's general policy with respect to its county hospitals is not in conflict with the principles petitioner here invokes is attested by § 22 - 3232, reading in part:

> "In the management of such public hospital, no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Indiana, and all such legal practitioners shall have equal privileges in treating patients in said hospital."

When the four respondent trustees (whose qualifications are also the subject of specific legislative enactment under § 22 - 3217) adopted the rules and regulations upon which they have relied to debar petitioner of his rights, their action constituted state action within the principles established by many decisions of this Court. Discriminatory exclusion from a civic right is within the prohibition of the Fourteenth Amendment though it is the result of discrimi-

natory practices of selection employed by state officials, and not the result of direct statutory command. *Pierre v. Louisiana*, 306 U. S. 354; *Hale v. Kentucky*, 303 U. S. 613; *Norris v. Alabama*, 294 U. S. 587. The issuance of an injunction by a state court in accordance with its common law policy may invade federally-guaranteed rights. *American Federation of Labor v. Swing*, 312 U. S. 321. Judicial enforcement of restrictive private covenants is to be regarded as state action within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1, 13-14.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Supreme Court of Indiana should be granted.

July 1949

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IN THE

Supreme Court of the United States

October Term, 1949

No. .....

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et al.

MOTION TO DISPENSE WITH PRINTING OF RECORD

Comes now, D. Lee Andrews, petitioner herein, and moves this Honorable Court to dispense with printing of the record in this cause insofar as consideration of the petition for a writ of certiorari is concerned. In support hereof, petitioner respectfully represents:

1. Petitioner has this day filed with the Clerk of this Court his petition for a writ of certiorari to review a determination by the Supreme Court of the State of Indiana. That determination granted in part, but denied in large measure, relief requested by your petitioner against the only hospital in the county where he resides and practices his profession of medicine. Petitioner, under the determination here requested to be reviewed, has been deprived of the right to unrestricted use of this hospital in the practice of medicine. This denial has imposed a serious impediment upon his earning capacity in his chosen profession.

2. The Clerk of the Court has estimated that the cost of printing the record would be approximately $1200. This estimate is based upon the assumption that the transcript of the proceedings below would be shortened and diminished in every feasible manner. The estimated cost of printing the record would be a great burden upon your petitioner.

3. A certified transcript of the record in the cause was filed at the same time as was the petition for a writ of certiorari. The petition makes numerous references to the transcript of the record, and it is believed that this Court will be able to determine the merits of the petition without the assistance of a printed record. Much of the transcript of record, while of arguable relevance upon the ultimate issues should this Court grant the petition for a writ, is not immediately relevant to those considerations which this Court has said are significant in a determination whether or not a writ is to be granted.

4. WHEREFORE, petitioner respectfully prays that the Court dispense with printing of the record insofar as consideration of the petition for a writ of certiorari is concerned.

July 1949

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APPENDIX A

IN THE SUPREME COURT OF INDIANA

HAMILTON COUNTY HOSPITAL, et al.

v.

D. LEE ANDREWS

No. 28535

March 14, 1949

STARR, CHIEF JUSTICE:

The material facts, as shown by the record in this case, are not in controversy. They are as follows: that at all times herein mentioned, there has been in Noblesville, Hamilton County, Indiana, a duly organized county hospital organized pursuant to our statutes covering county hospitals; that on September 9, 1947, this hospital, through its trustees, who are among the appellants herein, adopted, among others, the following rules which are pertinent to this decision:

> "Article V — Medical Staff. Section I. The Hamilton County Hospital Staff as a whole shall be made up of the following groups or divisions; (a) The Active Medical Staff, which shall consist of: (1) The Resident Active Medical Staff, which shall include all the physicians having an unlimited license to practice medicine in the State of Indiana *and having membership in Hamilton County professional organization of fully licensed physicians having the largest number of such physicians residing in Hamilton County . . .*" (our italics) "(d) 2. All appointments to the Staff and assignments to services shall be made by the Board of Trustees *but only upon the recommendation of the Active Medical Staff*. (Our italics) The Board of Trustees will either accept the recommendations of the medical staff or refer it back for further consideration with a statement of its reasons for such action. When final action has been taken by the governing body the superintendent will be authorized to transmit its decision to the candidate and to the chief of staff. . . ."
>
> "Article VII — Choice of Physician or Surgeon —

Section 1. Patients entering the hospital shall have the right to employ the physician or surgeon of their choice; Provided, that such physician or surgeon satisfies the standards of preparation herein stated for the service he is employed to render, and conforms to the following requirements and conditions. (1) He must have an unlimited license to practice medicine in Indiana . . . (3) He must be a member of the Hamilton County Hospital Medical Staff, hereinafter generally referred to as the staff, as constituted under these rules and regulations; or if he is not a member he shall comply with the following provisions: (a) He is required to have with him in the treatment of his case a physician who is a member of the staff and who satisfies the rules and regulations as to qualifications to perform the services appropriate to the care and treatment of the patient. (b) He must, in arranging for admission of his patient, submit to the Superintendent, a written statement of the diagnosis he has made and the service he intends to render. (c) Upon receipt of such written statement, the Superintendent shall call in a member of the staff qualified to render the service mentioned in the written statement, which staff member shall have the right and duty to check the diagnosis and the services the non-staff physician proposes to render; and in event such staff member believes that said diagnosis to be incorrect the proposed treatment to be against the best interest of the patient, he shall so report to the Superintendent who shall transmit and explain to the patient such report. (d) The staff member called pursuant to (c) shall attend and be ready to assist in the rendering of any surgical or other services; and he shall be entitled to receive the same pay as he would receive for rendering the services himself which the patient receives from a non-staff physician and oversees. (e) The patient or the person responsible for the care of the patient who is admitted to the hospital with a non-staff physician attending him, shall be advised by the non-staff physician of all these requirements, including the obligation of the patient to pay the staff member; and the Superintendent shall have authority to make inquiries to determine whether or not such advice has been given and if she finds that it has not, then to give such advice herself. 4. A

surgeon desiring to practice surgery who was not a member of the surgical staff of the hospital according to the records of the hospital on March 1, 1947, shall possess the following qualifications, in addition to those mentioned under 1 and 2: (a) He shall be a member of the staff. (b) He shall have a certificate of interneship showing one year service as an intern in a hospital approved by the Council of Medical Education and Hospitals of the American Medical Association. (c) In addition to interne training required under (b) he shall have had not less than three years of surgical training which meets the approval of the American College of Surgeons.

The facts further reveal that the appellee was at all times referred to herein, duly licensed to practice medicine, surgery and obstetrics in Hamilton County, this state, but has not served an internship or had the required surgical training as required by the rules as a condition precedent to the practice of surgery in this hospital; that he became a resident of Noblesville, Indiana, about January 1, 1947; that shortly thereafter, he applied for membership in the Hamilton County Medical Society which is the "professional organization of fully licensed physicians having the largest number of . . . physicians residing in Hamilton County," as referred to in the above rules; that this application was denied; that the hospital thereupon, in accordance with the above rules, refused to permit the appellee to treat his patients in the hospital unless accompanied by a member of the staff; and finally, that at the time of appellee's application for membership in the medical society he was, and still is, practicing his profession at Noblesville, Indiana.

Appellee brought this action to enjoin the appellants, who are the board of trustees of said hospital and the superintendent of the same, from preventing him from practicing in, and using the hospital. He also named as defendant the Hamilton County Hospital as a legal entity. It has also been named as a party appellant to this appeal. No objection having been made to this irregularity, we will

ignore the same. His complaint, based upon the admitted facts, is on the theory that the involved rules are arbitrary, discriminatory, unreasonable, monopolistic in their nature, and in restraint of trade.

The trial resulted in a finding and judgment in favor of the appellee against the appellants, enjoining them as prayed. It is from this judgment this appeal was taken.

Appellants have assigned as errors the overruling of their demurrer to the complaint, and the overruling of their motion for a new trial.

One ground of demurrer was for defect of parties claiming that appellee's patients were necessary parties plaintiff. The other ground for demurrer was for insufficient facts for the reason that the trustees had the right to adopt rules, and that the above set out rules are reasonable. The motion for a new trial assigns as reasons therefor, that the decision is not sustained by sufficient evidence and is contrary to law.

There is no defect of parties plaintiff. No reputable physician residing in a county of this state having a county hospital, can be discriminated against by such hospital. This is a right which belongs to him and not his patients. Regularly licensed physicians have a right to practice in public hospitals of this state so long as they stay within the law and conform to all reasonable rules and regulations of the institutions. 26 Am. Jur. *Hospitals and Asylums* §9, p. 592; *Henderson* v. *Knoxville* (1928), 157 Tenn. 477, 9 S. W. (2d) 697. In fact the first act which empowered a county of this state to establish a hospital contains the following provision:

> "Any reputable physician residing in any county in this state so establishing or requiring (acquiring) a hospital under this act may have his private patients cared for at such hospital, under the same conditions and upon the same terms that other pay patients are cared for at such hospitals, and such physician shall be permitted to attend and in all things treat his said patients in the manner that to him seems best: Pro-

vided, however, That all physicians shall be subject to the rules and regulations of said hospital, and said rules and regulations shall be the same to all physicians by this act authorized to have their patients cared for at said hospital." § 22-3208 Burns' 1933 (Acts 1903, ch. 86, § 8, p. 167)

The rulings of the trial court in overruling the second ground of demurrer, and overruling the motion for a new trial, present the same questions, as the facts proved in support of the complaint are admitted to be true and are the same facts as are alleged in the complaint. We will therefore consider these rulings together.

To require membership of the appellee in the resident active medical staff before permitting him to practice in the hospital, would be a reasonable requirement if such staff were provided for by reasonable rules of the hospital, or the Board of Health through its council, as provided for by our statutes. § 42-1607 et seq. Burns 1940 Replacement, (Supp.), (Acts 1945, ch. 346, p. 1639). We say this in the face of § 22-3232 (Acts 1917 Ch. 144, § 13 p. 527) which among other things provides: "The patient shall have the absolute right to employ at his or her own expense, his or her own physician, and when acting for any patient in such hospital, the physician employed by such patient shall have exclusive charge of the care and treatment of such patient. . . subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this act." It is our opinion that requiring membership in the staff is such a general rule as is contemplated by the foregoing quoted statute. The present rules, however, provide that the hospital can appoint new members to its staff only upon recommendation of its staff. It would seem by this rule, recommendation to membership may be rejected by the board, but that no one shall be made a member of the staff without such recommendation. This is an unreasonable requirement, as by it the hospital delegates to its staff a virtual veto of its right to perform one of its

duties. By this arrangement the staff dictates what physicians may practice in the hospital. In so holding we are aware that courts of at least one other jurisdiction have approved of staff selection in public hospitals by invitation from their staff. See *Selden v. City of Sterling* (1942) 316 Ill. App. 455, 45 N. E. (2d) 329. With this holding we cannot agree.

It will be further noted that by the involved rules, appellee's right to practice in the hospital is not only conditioned on his being a member of the staff, but also on his being a member of the Hamilton County Medical Society, an extra governmental agency. His admission to this society depends entirely upon the sole determination of the society. *Medical Soc. of Mobile County* v. *Walker* (1944) 245 Ala. 135, 16 So. (2d) 321; *Harris* v. *Thomas* (1920) (Tex. Civ. App.) 217 S. W. 1068; *McKane* v. *Adams* (1890) 123 N. Y. 609, 25 N. E. 1057; 4 Am. Jur. *Associations and Clubs* §11, p. 462. Whether he could ever become a member depends upon conditions beyond his control. By this rule the hospital again delegates its power to determine what physicians may use its facilities. It amounts to a preference in favor of the society and a discrimination against those physicians who by choice or otherwise, are not members of same.

The rule in question relating to surgery which requires a surgeon who was not a member of the staff on March 1, 1947, not only to be a physician licensed by the state, but to have had one year service as an interne in an approved hospital, and three years of surgical training which meets the approval of the American College of Surgeons, as applied to a public hospital such as here involved, is reasonable. We recognize the right of public hospitals to make and enforce reasonable rules for the protection of its patients. In fact such power is expressly conferred by the sections of our statutes above quoted. We judicially know, and the testimony in this case amply illustrates, that a license to practice medicine does not guarantee that the holder thereof is capable of doing surgery. See *Green* v.

City of St. Petersburg (1944) 154 Fla. 339, 17 So. (2d) 517 wherein reasons in defense of this proposition are well stated. It is true that part of what was said in the last cited case seems to have been said on the assumption that the maintenance of a public hospital by a municipality is not a governmental function which is contrary to the law of this state. *Board of Comrs. of Greene County* v. *Usrey* (1943) 221 Ind. 197, 46 N. E. (2d) 823. Nevertheless, without this assumption, the reasoning in the Florida case is sound. In oral argument it was also suggested that this rule as to surgery is discriminatory, as it does not apply to those physicians who were members of the staff prior to March 1, 1947. With this we cannot agree. Similar classifications have been upheld for legislative purposes. *Boliver Twp. Bd. of Fin. of Benton Co.* v. *Hawkins* (1934) 207 Ind. 171, 191 N. E. 158; *Perry Tp.* v. *Indianapolis Power and Light Co.* (1946) 224 Ind. 59, 64 N. E. (2d) 296.

It is our conclusion the complaint states facts which entitle the appellee to some relief; namely, the right to practice general medicine, excluding surgery, in the hospital, without being a member of the staff as here constituted, as membership on this staff can only be increased upon recommendation of the staff and is limited to members of the Hamilton County Medical Society. The demurrer for insufficient facts was therefore properly overruled. As to the sufficiency of the evidence to support the finding, it is our opinion that the appellee is not qualified, under the valid portions of the rules now in force, to perform surgery in the hospital.

We, therefore, reverse that portion of the judgment of the trial court which enjoins the appellants from preventing the appellee from doing surgery in the hospital, and affirm that portion of the judgment which enjoins the appellants from preventing the appellee under the present rules from practicing medicine in the hospital other than surgery.

As the evidence in this case is not in controversy and will not change, we instruct the trial court to enter its finding and judgment in accordance with this opinion.

IN THE SUPREME COURT OF INDIANA

Apr 25 1949

OPINION DENYING PETITION FOR REHEARING

STARR, CHIEF JUSTICE:

In our original opinion we approved the rule of the hospital relating to surgery which required a surgeon to have had one year service as an intern in an approved hospital, and three years of surgical training which meets the approval of the American College of Surgeons. We construe this rule to mean three years of training of the standard approved by the American College of Surgeons. It was an adoption of a certain standard of training which has not been shown to be unreasonable and was not in any sense a delegation of authority to the American College of Surgeons to determine whether that standard had been complied with in each instance — that determination rests with the board of trustees of the hospital.

The petition for rehearing is denied.

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States

October Term, 1949

No. 205

D. LEE ANDREWS, *Petitioner,*

v.

HAMILTON COUNTY HOSPITAL, et al,

Respondents.

Respondents' Brief In Opposition To Motion To Dispense With Printing The Record; and Respondents' Offer To Stipulate Regarding The Printing Of The Record.

Respondents intend to file a brief in opposition to the petition for a writ of certiorari. They cannot consent and stipulate that the printing of the record be dispensed with. The fact that the Respondents maintain that the Statement of Facts contained in the petition is inaccurate and insufficient impells them to oppose the motion for the following reasons:

1.

The statement in the petition, pages 1 to 6, purports to set out the facts in the case, but there will be a sharp conflict on the question as to whether or not the statement is a correct statement of the facts. That question can be determined only

by reference to the record. There will therefore be immediate need for all who read the Petition and the Brief in opposition to it to have recourse to the record to determine which of the conflicting statements of fact are true.

2.

Some of the statements of fact in the Petitioner's brief which will be challenged are:

(a) That he is a member of the Indiana State Medical Association and a fellow of the American Medical Association. The Respondents will maintain upon this point that the Petitioner did not know whether or not he was a member of these associations, but that he had no evidence that he was.

(b) That his educational qualifications to practice medicine have never been questioned by any hospital. The fact is that the Hamilton County Hospital in this case questioned his educational qualifications to practice major surgery, which is a specialty in the practice of medicine. The Respondents presented that very question in this case,—and the Indiana Supreme Court said:

"* * * it is our opinion that the Appellee is not qualified. * * * to perform surgery in the hospital."

(c) That the performance by the Petitioner of the number of operations mentioned on page 3, show competency as a surgeon, which that statement was obviously intended to show. In this connection additional citations will be made to the record of evidence that competency in the performance of surgery cannot be determined by the number of operations performed,—for if they were performed on people of strength and vitality and particularly on people who

did not need the operations, the patients would be likely to recover no matter how bungling the surgery was.

(d) That the Petitioner was refused permission to admit patients because of his lack of membership in the Society. Respondents' Brief will show that refusal was based upon his failure to conform to the rules which, so far as they pertained to educational requirements for performing surgery, the Indiana Supreme Court found were reasonable, and under which he could not qualify as a surgeon because of lack of training. So far as any refusal to admit the Petitioner because of non-membership in the Society ever was involved in this case, the point has been decided by the Indiana Supreme Court in its holding that the requirement of membership in the Society was unreasonable and could not be enforced.

3.

A fuller statement of facts will be included in the Respondents' Brief in opposition to the petition; and to satisfy the rules of this Court citation to the record in support of the additional facts must be made. The rules of this Court require that ten copies of the printed record be furnished at the time the petition is presented. (Rule 38.7) This apparently has not been done, for the petition on page 1, speaks only of "a transcript of the record" being furnished. In view of the nature of the questions of fact to be decided, which are presented in the petition and which will be presented in the brief of Respondents, one copy of the record is not adequate for use both in the briefing and in the consideration of the case by the Court. The attorneys for the Respondents, having no copy of the record, would have to rely, when they write their brief, upon their own memory concerning the record and upon the statement of the record as it is condensed in their brief on appeal to the Appellate

Court of Indiana and in subsequent briefs in connection with the transfer to the Indiana Supreme Court. That is not satisfactory, for it makes it impossible to cite the record accurately in support of their statements of facts in the record.

For the foregoing reasons the Respondents oppose the motion to dispense with the printing of the record, or at least with the printing of the ten copies of the record required by the rules of this Court to accompany the Petition for a writ of certiorari.

OFFER TO STIPULATE REGARDING PRINTING OF THE RECORD

The Respondents are willing to co-operate with the Petitioner in avoiding expense and reducing to the utmost the amount of printing of the record that would be required. They therefore offer to stipulate that it will be sufficient to present all the questions in this case to print as the record only the following:

> That part of the Appellants' Brief filed in the Appellate Court of Indiana contained under the title "Concise Statement of the Record," which begins on page 4 and ends on page 163.

This offer, although suggesting the inclusion only of the statement prepared by the Respondents as the correct statement of the record, is a fair offer, as will now be shown:

1. Under the rules of Appellate procedure in Indiana the Appellant is required to include in his brief a concise statement of the record. Then if that statement is not satisfactory to the Appellee, the Appellee may add to it or point out wherein the statement is insufficient or inadequate. In this case the Petitioner, as Appellee in the Appellate Court, made

this statement regarding the Appellants' statement of the record contained in the Appellants' Brief:

> "Appellants' statement of the record is substantially complete and correct and sufficient to permit the presentation of questions pertaining to the alleged errors."

There were no corrections offered nor any points questioned by the Appellee regarding the Appellants' statement of the record.

2. The statement of the record contained in Appellants' Brief is typed in double space pica type, and there are about 175 words to the page in the 159 pages. This could all be printed in conformity with the rules of the United States Supreme Court in probably less than 70 pages. This would reduce the printing bill to where it would be no serious burden.

3. The statement of the record from Appellants' Brief includes the pleadings, the action of the court and a narrative recital of the evidence of each witness. Nothing that would be needed for the consideration of this case would be left unprinted if this stipulation is accepted. The decisions of the Indiana Supreme Court on the merits and on the denial of petition for rehearing, and the dates thereof, are already printed as Appendix A of the Petition for the writ.

In event this offer to stipulate is accepted and the printed record is supplied, the Respondents will have to ask for an enlargement of time within which to file their brief in opposition to the petition for the writ of certiorari, unless the printed record is available promptly. If they ask for such

enlargement it will be for thirty days after the receipt by them of the printed record.

RESPECTFULLY SUBMITTED,

ALBERT STUMP,
Attorney for Respondents.

Of Counsel:
CAMPBELL & CAMPBELL,
Noblesville, Indiana.

INDEX

	Page
Jurisdiction	1
Questions Presented	2
Criticism of and Addition to Petitioner's Statement	3
Omissions and Inaccuracies in Petitioner's Statement	6
On Petitioner's alleged Reasons for Granting the Writ	13

CITATIONS

CASES

American etc. v. Kentucky, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639

Hayman v. City of Galveston (1927), 47 S. Ct. 363, 272 U. S. 414, 71 L. Ed. 714

RULES

U. S. Supreme Court Rule 12.1

U. S. Supreme Court Rule 27.2 (c)

STATUTES

Burns Indiana Statutes 1933, Section 22-3229

Burns Indiana Statutes 1933, Section 22-3230

Burns Indiana Statutes 1933, Section 22-3232

Burns Indiana Statutes 1947 Supp., Section 42-1601 et seq.

IN THE

Supreme Court of the United States

October Term, 1949

No. 205

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et. al,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Respondents are assuming in this brief that the Petitioner regarded what he termed his "Petition for a Writ" to include not only the petition but also the brief in support of it, all in one document; and in this brief the Respondents will so treat the petition.

JURISDICTION

The Petitioner's brief merely cites the section of the statute under which the final judgment of the Indiana Supreme Court may be reviewed by the Supreme Court of the United States. The Supreme Court Rule 27.2(c) requires more than that. It requires a "statement of the grounds upon which the jurisdiction of this court is invoked, embodying all that is required to be set forth in the statement described in " paragraph 1 of Rule 12. That is, the requirement for the establishment of jurisdiction in a petition for a writ of certiorari is substantially the same as the statement of jurisdiction required upon appeal.

This is an action brought by the Petitioner to enjoin the enforcement of certain rules and regulations adopted by the governing board of a county hospital in the State of Indiana, on the ground that the rules were unreasonable. The Supreme Court of Indiana found that part of the rules were unreasonable. But it held that the rule fixing the educational qualifications for one seeking to use the hospital facilities for the performance of surgery, were reasonable and should be enforced. The question as to whether the regulation of hospitals not owned and operated by the United States Government is within the police powers of the State and not within the police powers of the Federal Government, has already been decided by this Court in Hayman v. City of Galveston, (1927), 47 S. Ct. 363, 273 U. S. 414, 71 L. Ed. 714.

This case effectually settles the law on that point. There is, therefore, no substantial federal question left upon which to exercise the jurisdiction of the Supreme Court of the United States.

There is nothing in the petition or brief of the Petitioner under the heading Jurisdiction, or any place else in the petition and brief, which will support any assertion "that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court". (Rule 12.1)

QUESTIONS PRESENTED

The Petitioner's statement on page 2 of what he claims is the question presented lacks something in the way of accuracy. The question is not whether a discriminatory and arbitrary refusal to permit a fully qualified medical practitioner to use the facilities of a hospital invades the constitutional rights of the Petitioner. The Respondents maintain that there was no discriminatory nor arbitrary refusal; and that the practitioner was not qualified under the rules of the hospital to practice surgery in the hospital. So the question presented may be stated thus:

> Does the adoption of reasonable rules and regulations and the uniform enforcement thereof violate any of Petitioner's constitutional rights, where the result is that the Petitioner, although a licensed physician, is thereby required to have a qualified assistant at hand when he performs surgery in the hospital, which is a hospital supported by Hamilton County under a county hospital law in Indiana?

That was the question which was presented to the Supreme Court of the State of Indiana. On the petition for a writ of certiorari two additional questions are raised, which are: (1) whether or not the Supreme Court of the United States has jurisdiction to review the decision by the Supreme Court of Indiana of the first question; and (2) whether or not this case is one in which that jurisdiction should be exercised, if the jurisdiction exists.

CRITICISM OF, AND ADDITION TO, PETITIONER'S STATEMENT

The "STATEMENT" presented by the Petitioner does not afford an understanding of the true situation. Therefore, the Respondents submit the following as a criticism of the Petitioner's Statement, and an addition thereto. (These facts are in the record, but having no copy thereof we cannot give citations to it.)

1. The Petitioner entered Indiana University School of Medicine when he was about 33 years of age and graduated in 1938 when he was about 37. He immediately entered the practice of medicine and surgery, although he had had no interneship and no residency in any hospital. In this regard he did not follow the almost universal custom of those who are about to enter the practice of medicine on their own responsibility, as is shown by the fact that in a period of eleven years in Indiana University School of Medicine there were over 1200 graduates of whom all but six took at least one year of interneship, and of those six only three, of whom the Petitioner is one, entered the practice of medicine.

2. The only training the Petitioner received in surgery before going into the practice of it was the training he had in the Indiana University School of Medicine. But in the School of Medicine only didactic instruction in surgery is given. Training in surgery can be obtained only in interneship and residency. The Petitioner had no special training in surgery in the Fort Knox 1750 bed army hospital. He had only a rotating service. A rotating service is one in which he is in one type of medical practice for a while and then in another.

3. A certificate of service showing that his army specialty was plastic surgery shows no training in plastic surgery whatever.

When one enters the army as a doctor he fills in a form and in one of the blanks he indicates what type of work he would like to do. He may indicate a special interest, for instance, in plastic surgery. If he does, his record will show that his army specialty was plastic surgery. It is no evidence of any training in plastic surgery, or in anything else. It is only a statement of his choice of the kind of work he would like to do in the army.

4. While the Petitioner was in Louisville, Kentucky, he was excluded from practicing in three Louisville hospitals. He could only be a member of the Indiana State Medical Association and a fellow in the American Medical Association by being a member of a County Medical Society. He was not a member of the County Society.

5. After the Petitioner had gone into the practice of general surgery without training for that specialty and had been practicing for about a year, he then took a one month course in general surgery in Harvard University. Four years later while he was in the army he took a three months course in Columbia University. While he mentions eight hospitals in which he has practiced medicine he refers to only those in Louisville which have excluded him from practice in them, but he did not disclose whether there were any hospitals anywhere that were open to him at the time of the trial for the practice of major surgery.

6. There was no way by which the competency of the Petitioner to practice general surgery could be ascertained from his own statement as to the number of operations he had performed. This could be learned only by a study of the cases, including an inquiry into whether they needed the operations and what their physical conditions were at the time the operations were performed. It is well known that those who are in good health can endure an amazing amount of operative procedures of all kinds and still survive.

7. The educational qualifications of the Petitioner to practice general surgery have been questioned by the Hamilton County Hospital. The issue was before the Indiana Supreme Court, and it found that he was not qualified under the rules. See page 21 of Petition for Writ.

8. The statement of the superintendent approving the Petitioner's proposal to locate in Noblesville is no fact establishing his qualifications as a major surgeon nor the unreasonableness of

the rules challenged in this litigation. The fact that the Respondent Hospital is the only hospital in the county is no reason for it to be open for the practice of major surgery by one not qualified for such practice. Competent surgeons thoroughly qualified under the rules of the hospital are available to perform such service. Under the decision of the Indiana Supreme Court the Petitioner is allowed to practice in the hospital as a general practitioner. The Indiana Supreme Court found that the rules under which he would have been prohibited from carrying on such general practice on his own responsibility were unreasonable, and no effort of course is being made to enforce such rules.

9. The first paragraph on page 4 of the petition disregards the fact that the petitioner under the rules can always come into the hospital to perform any kind of service, even including surgery, provided he has a standby, qualified surgeon present for the protection of the patient. The paragraph also overlooks the fact that the Petitioner is permitted to engage in general practice in the hospital. What the superintendent and trustees meant regarding lack of knowledge of any reason why the Petitioner should not be permitted to practice on his own responsibility obviously was that they knew of no reason provided he would meet the educational qualifications.

10. In the second paragraph on page 4 of the petition he speaks of his failure to gain membership in the Hamilton County Medical Society. The Hamilton County Medical Society is not a party to this case. No member of it is. It was not called upon to give the reasons for denying membership to him. But nothing in that connection sheds any light on the question as to any educational qualifications of the Petitioner and the reasonableness of rules that were sustained by the Supreme Court of Indiana.

11. With regard to the last paragraph beginning on page 4, there is no basis for any inference that the rules and regulations were adopted for any other purpose than to maintain high standards for protection of the public. The trustees were required to adopt rules and regulations under the Indiana Hospital Law. The adoption of rules and regulations was not done hastily. It had been under consideration and study, and investigation of the rules had been under way for some time before they were finally adopted. There is no more reason for inferring

that the trustees, in adopting the rules, were acting for the sole purpose of blocking admission of the Petitioner than there would be to assume that the Petitioner got wind of the rules and regulations under consideration and thereupon tried to get a commitment for admission before the rules were adopted.

12. In the full paragraph on page 5 the Petitioner emphasizes the requirement for membership in the County Society. There is no longer any point to that emphasized language,—for the Indiana Supreme Court held that that requirement was invalid. So it affords no basis for a petition for a writ of certiorari. The same is true regarding the recommendation of the active medical staff. See Petition, pages 20 and 21.

13. The fixing of the date of March 1, 1947 as the date after which membership on the surgical staff can be obtained only by showing the special training referred to in the petition on page 5, was not unreasonable under the laws of the State of Indiana. In all cases where a beginning had to be made with respect to the establishment of standards similar classifications have been made and upheld, just as the Indiana Supreme Court said. See page 21 of the Petition.

14. The second paragraph on page 6 of the Petition contains the statement that the Supreme Court "failed to advert to the facts that these requirements were applicable only to physicians who were not members of the staff on March 1, 1947". That statement obviously was written without regard to the fact that the opinion shows that matter was "adverted" to by the Supreme Court. See Petition page 21.

In order that the United States Supreme Court may know conveniently the extent to which the "Statement" in the petition has omitted pertinent facts of the record attention is invited to the following:

OMISSIONS AND INACCURACIES IN PETITIONER'S STATEMENT

(References are to Appellants' Brief filed in the Appellate Court of Indiana. There is no printed copy of the Record available to which citations can be made for these statements, the Petitioner having failed to comply with the rules of this Court in regard to printing the record.)

1. No statement was made concerning the various kinds of surgery performed by the petitioner. Page 28.

2. No statement was made with reference to the fact that petitioner followed the profession of the ministry until about the time of graduation from medical school in 1938. Page 53.

3. There is no statement concerning the fact that he was denied the privilege of doing tonsillectomies in the Methodist Hospital at Indianapolis. Page 54.

4. No statement was made concerning the fact that he was not admitted to the Medical Society of Louisville, Kentucky. Page. 55.

5. No statement was made with reference to the fact that he was denied the right to practice his profession in three different hospitals in Louisville, Kentucky. Page 55.

6. No reference was made to the fact that he telephoned from Louisville to the Witham Hospital in Lebanon, Indiana, 140 miles of Louisville and asked permission to bring a patient from Louisville to Lebanon for a cesarean section, and was denied permission to do so. Page 56.

7. No reference was made to the fact that his license to practice medicine in Hamilton County is dated September 10th, 1947. Page 26.

8. No reference was made to the testimony of Dr. L. M. Headley, a witness called by petitioner, who testified as follows:

> "I cannot answer the question as to whether or not he is a skilled and competent surgeon without a little qualifying." Page 66.
>
> "Hospitals themselves set up general standards in order to maintain good operation of the hospital. That is common practice among hospitals. I think it is the reasonable thing to do in the management of the hospital." Page 67.
>
> "A physician who has graduated from a medical school but has had no special training for surgery would not ordinarily be admitted into a hospital for the practice of any special type of surgery, for instance surgery of the eye." Page 68.
>
> "I think it would be a nice thing if all our hospitals required special training." Page 68.

9. No reference was made to the testimony of Dr. John Hancock, a witness called by petitioner, who testified on cross-examination, as follows:

> "I presume it is more or less right, that to be a member of the staff one must have one year interneship." Page 70.
>
> "I think each hospital has its own requirements for admission of physicians and surgeons. The requirements vary." Page 71.
>
> "I think that probably Class A hospitals do not permit general surgery on the basis of having only a general license to practice medicine." Page 72.

10. No reference was made to the testimony of Paul Manship a member of the Hospital Board, who testified that the formulation of rules and regulations for the hospital had been under consideration since about the year 1945 until their final adoption on September 9th, 1947. Page 74.

11. No reference was made to the testimony of C. A. Craig, a member of the Board of Trustees, who testified concerning adoption of rules and regulations which had been under consideration for two or three years. Page 75.

12. No reference was made to the testimony of Carrie Cox Bell, a member of the Board of Trustees, who testified concerning the adoption of rules and regulations and the attempt to have the Hamilton County Hospital registered by the American Hospital Association. Page 78.

13. No reference was made to the testimony of Kittie McKelvey, Superintendent of the Hamilton County Hospital, who testified concerning the rules and regulations and the attempt to have the hospital registered by the American Hospital Association, and as to conversations with petitioner with reference to petitioner's attempt to have his patient admitted into the hospital as a surgical case without giving any diagnosis or statement concerning the patient's disease. Page 80-82.

14. No reference was made to Exhibit 2 which is form of application for federal aid in the construction of a new hospital which contains a statement with reference to the minimum standards required. Page 83.

15. No reference was made to the testimony of John D. Van Nuys, Dean of the Indiana University School of Medicine, who testified as follows:

> "Hospitals generally recognize the necessity for special training for surgery. It is the general practice of hospitals not to admit physicians to do surgery although they have a general license to practice medicine in all its forms, unless they have had special training in surgery. The amount of special training for surgery usually required by hospitals is one year of interneship and three years of certified residency." Page 93.

He also testified that the rules and regulations conformed to the usual rules and regulations with respect to requisite training or surgery. Page 101.

He also testified that hospitals need guiding rules and regulations to protect their patients and to guarantee professional high quality . . . . . Without such rules and regulations it would be impossible to operate a reasonable and safe hospital. Page 102.

He Said:

"I feel that the hospital has the right in accepting a patient to enforce certain standards that would be in the interest of the patient." Page 104.

"A physician who has had one month in Harvard and three months in Columbia School of Medicine after graduation from Indiana University School of Medicine, that training, in my opinion would not be sufficient to qualify the physician for general surgery." Page 107.

"Graduating from Indiana University School of Medicine would not quality one to perform the surgery listed." Page 107.

"Out of 1200 graduates of Indiana University School of Medicine in the past eleven years, I find six graduates who did not have interneship. Three of the six entered the practice of medicine; the other three are women, two of whom are married and have established homes, and the other is an assistant in a student health service; and one of the three first mentioned is Dr. Andrews." Page 108.

"Hospitals generally would not permit the surgery listed on Exhibit. . . . to be performed with the qualifications of petitioner, as listed in question." Page 109.

"The Board of Plastic Surgeons requires five years training after the year of interneship." Page 110.

"Work in one's own office or hospital with no one else working as a preceptor or supervisor of his work would not be accepted as satisfactory for qualifying one to enter into the practice of general surgery in an accredited and registered hospital." Page 111.

"I base my assumption that he is not qualified to perform the operations stated upon what is ordinarily recognized in the various communities as standard practice .... He is qualified to get an M. D. degree, just as I have an M. D. degree, but I would not do major surgery because I am not competent." Page 116.

16. No reference was made to the testimony of J. B. H. Martin, Administrator of the Indiana University Hospitals, who testified that:

"There are recognized standards that are required of all hospitals to entitle them to register with the American Hospital Association. Certain of these standards apply to the qualifications of physicians and surgeons for admission to the staff of the hospitals." Page 117.

He further testified that the rules and regulations in question:

"are reasonable standards generally considered as proper in this day for hospitals." Page 118.

"I would not think it would be good policy on the part of a hospital and in the interest of the general public for a hospital to permit one who had no specialized training in surgery to perform general surgery in the hospital." Page 119.

"As a hospital administrator it is my opinion a hospital which would permit physicians immediately upon graduation and without any interneship to perform surgery would not be classed as a first class hospital in protecting its patients. Such practice would be detrimental, in my opinion, to the general welfare of the patients who sought treatment in the hospital and generally detrimental to the public interest." Page 119.

17. No reference was made to the testimony of Dr. E. H. Clauser, Chairman of the Indiana Hospital Council, who testified as follows:

"Most of the hospitals do not permit physicians who have just graduated from medical schools to come into

them and perform major surgery. As far as I know, all registered hospitals follow that practice." Page 121.

"I don't think any physician who graduated from Indiana University School of Medicine without further preparation for surgery would be competent to perform the whole list of items of surgery contained in defendants' Exhibit 3." Page 121.

"I believe it would be very bad practice in the operation of a hospital to permit a physician with only that amount of training to come in and perform all those items of surgery." Page 122.

He further testified that the rules and regulations in question are reasonable and set forth minimum requirements, and for a hospital in Indiana to be approved by the Indiana Hospital Council, it would be required to conform to such requirements. Page. 123. Such requirements are in the interest of the general public. Page 124.

"The fundamental interest of all regulations is the safety of the patient." Page 125.

No reference was made to Exhibit 5 which consists of rules and regulations adopted by the Indiana Hospital Council. Page. 126.

"The State holds a hospital responsible for safe-guarding the patient and in doing that they must select membership of the staff." Page 132.

18. No reference was made to the testimony of Dr. Robert E. Jewett, Executive-Secretary of the Indiana Hospital Council and a member of the Staff of the State Board of Health, who testified as follows:

"The rules and regulations with respect to qualifications of physicians apply both to public and private hospitals. Under the hospital laws of the State of Indiana, the Council cannot make any distinction between public and private hospitals. Whatever is required of a private hospital is also required of a public hospital.

All hospitals must alike conform to the rules and regulations of the Council. It is the prerogative of the hospital itself to establish such rules and regulations regarding appointments to the medical staff as the governing board deems necessary. In the last two years several hospitals have adopted formal written policies

> and regulations. I would say there is a universal tendency to require graduation from an accredited school, at least one year of rotating interneship, and as to specialties, including surgery, the minimum requirement I would say would be two years of accredited training in an approved residency or sufficient continuous service in surgery as an assistant or junior surgeon under a surgeon with adequate qualifications." Page 140.

19. No reference was made to defendants' Exhibit 6 and 7, which are pamphlets published by the American Hospital Association, recommending minimum standards for hospitals and membership on medical staff. Page 144.

20. No reference was made to the testimony of Nellie G. Brown, Superintendent of Ball Memorial Hospital, Muncie, Indiana, who testified as follows:

> "We require interneship for general practice in our hospital and have for several years. The older men were admitted without interneships. Interneships and residencies were not then available, but since they have become available we require them." Page 156.

> "We require that any man coming in to practice surgery be a graduate of a Class A school; that he has served his interneship, and that he has had three years of organized experience in surgery, which may be divided between a two-year surgical residency and two years as an assistant." Page 156.

She further testified that the rules and regulations in question are reasonable and conform to the usual standards of hospitals throughout the country. Page 157.

21. No reference was made to the stipulation which shows that there are twenty-five duly licensed physicians residing in Hamilton County engaged in medical practice; that only twenty-two have membership in the Hamilton County Medical Society; nor that the constitution and by-laws of the Hamilton County Medical Society in force for more than twenty-five years did not require one year of interneship or any period of residency as a prerequisite to admission, but all doctors who have become members of said Society within the past twenty years, have had one year of interneship. Page 159.

22. There was no reference to the testimony of petitioner with reference to his membership in the Indianapolis Medical

Society and the American Medical Association, which under the evidence is a disputed fact. Page 135.

ON PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

This case involves no question of any discriminatory and arbitrary restrictions. The citations in Plaintiff's Brief and quotations under No. I, from pages 7 to 9, have no application to any fact in this case. No case is cited by the Petitioner supporting the proposition that a license to practice medicine in Indiana means the right to perform any kind of service within the field of medicine whether the service requires special training or not, even though the licensee has no special training. Indiana could, by direct legislative command, fix the qualifications for entrance into any hospital, either public or private, for the performance of major surgery. In effect it has done so. It has passed laws expressly authorizing the boards of trustees of county hospitals such as the Respondent Hospital, to adopt rules and regulations for their government.

Burns Indiana Statutes 1933, *Section* 22-3229;
Burns Indiana Statutes 1933, *Section* 22-3230;
Burns Indiana Statutes 1933, *Section* 22-3232.

The right of Respondent Hospital to adopt rules and regulations was further confirmed by the Hospital Licensing Law approved March 9, 1945, Acts 1945, Chapter 346, page 1639; Section 42-1601 Burns Supplement; and by the rules and regulations promulgated by the Indiana Hospital Council which were introduced in evidence on the trial of this case.

The Supreme Court of Indiana in the course of its opinion in this case held:

"It is our opinion that that requiring membership in the staff is such a general rule as is contemplated by the foregoing quoted statute", referring to Burns 1933, Section 22-3232.

The Supreme Court further held:

"We recognize the right of public hospitals to make and enforce reasonable rules for the protection of its patients. In fact such power is expressly conferred by the sections of our

statutes above quoted. We judicially know, and the testimony in this case amply illustrates, that a license to practice medicine does not guarantee that the holder thereof is capable of doing surgery."

This case presents only a question of local law, and the actual facts of the case show that the rules in question are thoroughly reasonable. But besides that there is no evidence that they are unreasonable. There is no question involved in this case that has not already been settled by this Court, and there is no question involved regarding any discrimination. This is a case to which the following statement from the United States Supreme Court definitely applies:

"Save in exceptional circumstances, not now present, we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. The due process clause does not take up the laws of the several states, and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

American, etc. v. Kentucky, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639.

Under No. II, on page 9, the Petitioner says, "That arbitrary discrimination was practiced and enfored against your petition is not open to doubt." The statement is more than open to doubt. It is directly contrary to the truth in the case. Somewhere there had to be a beginning of the application of a standard of proficiency to be applied to surgeons for the protection of the general public using this hospital. If the Petitioner complied with the rules he could get in on the same terms as any of the others who complied with the rules.

The action of the County Medical Society in rejecting his application for membership is not open to inquiry in this appeal. The Petitioner tries to make it appear that there was something sinister in the action of the Society, now that the case is on appeal. But he did not see fit to open the inquiry in the trial and ask for the reasons why he was not admitted.

There is no significance whatever in the dates on which any actions were taken, either by the Society or the Hospital, as has already been shown.

The Indiana Supreme Court assumed nothing in this case. It acted upon the facts that were abundantly supported by the evidence. The complaint of the Petitioner was that the rules were invalid and unreasonable. Here again we need the record to cite for the purpose of showing what issues were submitted by the Petitioner in the beginning of this litigation. He made no complaint of any action of the County Medical Society except merely to state that he had been refused admission. This is all he said about the Society in his complaint:

> "That the Hamilton County Professional organization has refused to admit plaintiff as a member thereof and is the organization referred to in Article V of said rules adopted by said Board of Trustees of said Hamilton County Hospital."

He did not state that the action of the Society wronged him or that he wanted its action inquired into. He merely presented their action as a fact, without comment. The people he complained of were the Superintendent and the members of the Board of Trustees. His whole complaint was regarding the validity of the rules. But now on appeal he attempts to inject into the case what he calls the "context of surrounding circumstances". This should not draw attention away from the only questions in this case on his complaint which are:

(1) Were the rules regarding educational qualifications reasonable?

(2) Did the Petitioner meet those rules?

The rules regarding qualifications for the practice of surgery were not considered *"in vacuo"*, as the Petitioner charges on page 10 of the Petition. The very practical problem was involved of protecting the lives of the patients admitted into the hospital and preventing the hospital from being used to the disadvantage of the public. Surgery is not performed "in vacuo". It requires cutting and getting right into the vital arrangements of human beings. If it were done "in vacuo" there would be no need of precaution.

There is no mystery about why the Respondents adopted and now seek to enforce the rules, in spite of the innuendo in the note on page 10 of Petitioner's Brief. It is to comply with the law, and protect the public against inadequate preparation of physicians who desire to use the hospital.

All that the Petitioner needs to do, under the decision of the Indiana Supreme Court, to get into this hospital and perform general surgery is to make reasonable preparation to perform that service.

There is no case which, either directly or indirectly, by general principle or by specific statement, supports the position of the Petitioner. If there is such a case it has not been cited in the petition, and attorneys for Respondents have been unable to find it.

It would be a staggering blow to the programs and policies of the hospitals of the United States for the protection of their patients if this Court were to hold that rules and regulations setting up educational qualifications now generally recognized by all hospitals of repute and standing are unreasonable. Yet in view of the issues made by the pleadings in this case and by the decision of the Supreme Court of the State of Indiana, that appears to be the only ground on which this Court could set aside the decision of the Supreme Court of Indiana. It is respectfully maintained that for this Court to grant the petition for a writ of certiorari would do violence to the principles of law clearly and correctly stated and well established by decisions of this Court.

WHEREFORE, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted

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